No. 05-727

2005

In The
Supreme Court of the United States

EVERYTHING FOR LOVE, INC.,
WENDY ROBBINS and JORLI McLAIN,

Petitioners,

v.

TENDER LOVING THINGS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a motion asking a state court to enter a judgment requiring the non-moving party, if it chooses to sell devices covered by a certain patent, to purchase them from the patentee's licensee, arise under the Federal patent laws and fall within the exclusive jurisdiction of the federal courts where there has been no determination as to the scope of the claims of the patent?

2. Where the owner of a federally registered trademark has abandoned use of the mark in connection with devices covered by a certain patent, but continues to use the mark in connection with other products, may a state court order the partial assignment of the trademark for purposes of the abandoned use only, without mentioning goodwill?

LISTING OF PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

RULE 29.6 STATEMENT

Petitioner Everything For Love, Inc. does not have a parent corporation. No publicly held company owns 10% or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Everything for Love, Inc., Wendy Robbins and Jorli McLain respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal.

OPINIONS BELOW

The order and judgment of the California Superior Court are not reported. Neither the opinion of the California Court of Appeal, the order of the Court of Appeal denying rehearing, nor the order of the California Supreme Court denying review are included in the official reporter. However, the opinion of the California Court of Appeal is available on-line at 2005 WL 902648 and at 2005 Cal. App. Unpub. LEXIS 3470. The order of the Court of Appeal denying rehearing is available on-line at 2005 Cal. LEXIS 6862. The order of the California Supreme Court denying review is available on-line at 2005 Cal. LEXIS 7868.

JURISDICTION

The opinion and judgment of the California Court of Appeal were filed April 20, 2005. The Court of Appeal's order denying rehearing was filed May 16, 2005. The order of the California Supreme Court denying review was filed July 13, 2005. The Court has jurisdiction to review the judgment of the California Court of Appeal pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

Because the relevant statutes, 15 U.S.C. § 1060 and 28 U.S.C. § 1338, are lengthy, they are printed in full in the appendix hereto ("Pet. App.") at 48-49.

INTRODUCTION

In this petition, petitioners Everything for Love, Inc., Wendy Robbins and Jorli McLain (collectively, "EFL")

respectfully ask this Court to bring order and coherence to what Professors Wright, Miller and Cooper describe as a "very subtle" issue – "'one of the darkest corridors of the law of federal courts and federal jurisdiction'" – the question of when an action "arises under" the Federal patent laws for purposes of triggering exclusive Federal jurisdiction. C. Wright, A. Miller & E. Cooper, 13B Fed. Prac. & Proc. Juris. 2d § 3582, pp. 307 & n. 11, *quoting* Donald S. Chisum, *The Allocation of Jurisdiction between State and Federal Courts in Patent Litigation*, 46 Wash. L. Rev. 633, 639 (1971).

In settlement of litigation between the parties, EFL and respondent Tender Loving Things, Inc. ("TLT") entered into an agreement.[1] The agreement provided that if EFL purchased any head massager devices covered by a certain patent, owned by a business associate of TLT and supposedly exclusively licensed by TLT (the "Lacey/365 patent"), it would do so from TLT. The agreement is silent on what constitutes a device covered by the Lacey/365 patent. On TLT's motion, the California Superior Court entered that agreement as a judgment. The California Court of Appeal affirmed, and the California Supreme Court denied review.

Over the past hundred years, the lower courts have struggled to apply the Supreme Court's teachings on the issue of when an action arises under the Federal patent laws. In the process, two distinct and fundamentally irreconcilable lines of authority have arisen, forming the "dark corridor" of which Wright, Miller and Cooper write, sometimes holding that what appear on their face to be state-law contract actions do arise under the federal patent laws, and sometimes that they do not.

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[1] Before the California state courts, EFL vigorously disputed the existence of an enforceable agreement on numerous grounds, including fraud and mistake. However, since the purported agreement was challenged exclusively on state-law grounds, the validity of the agreement is not before this Court.

The California Court of Appeal's decision greatly exacerbates that conflict. The Court of Appeal's decision means that the mere presence of a contract in the case is enough to convert what is fundamentally a patent infringement claim – whether or not EFL sold devices "covered" by the Lacey/365 patent – into a claim cognizable in state court, without any determination as to what is "covered" by the Lacey/365 patent. The Court of Appeal's decision opens an avenue by which nearly all patent litigation can be diverted into the state courts, completely frustrating the constitutional imperative and Congress' intent that the law of patents be propounded on a uniform basis nationwide.

The Court of Appeal's decision also conflicts with a second line of authority. The Supreme Court has made it clear that any state-law system which conflicts with Federal goals in the area of patent law is preempted by the Supremacy Clause. In this case, the Court of Appeal's decision cobbles together the equivalent of a state-law claim for patent infringement, backed by the courts' power of levying contempt sanctions. For the state court to enforce a judgment of what is "covered" by a patent inherently allows the state court to interpret the patent claims and scope of patent coverage in frustration of the Federal goals of uniform patent laws and patent interpretation. The Court of Appeal's decision mandates that the state court will interpret and enforce federal patents, thereby setting up state court interpretation of patents and frustrating the federal interest in uniform patent law. The Court of Appeal's judgment is in excess of its jurisdiction.

Finally, the Supreme Court has held that the states lack the authority to prohibit the copying of inventions and processes which Federal law has determined are unpatentable. To avoid running afoul of this principle, any protection given by state law to a patented product would have to parallel Federal patent protection and immediately terminate if the patent were declared invalid, whether by the Federal courts or the United States Patent